Supreme Court, U. S.
FILED
OCT 1 1975
MICHAEL RODAK, JR., CLERK

No. 75-68

In the Supreme Court of the United States

OCTOBER TERM, 1975

GARY-HOBART WATER CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

JOHN C. MILLER,
Acting General Counsel,

JOHN S. IRVING,
Deputy General Counsel,

NORTON J. COME,
Deputy Associate General Counsel,

LINDA SHER,
Attorney,
National Labor Relations Board,
Washington, D.C. 20570.

INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statute involved	2
Statement	2
A. The Board's findings of fact	2
B. The Board's decision	6
C. The court of appeals' decision	7
Argument	8
Conclusion	11

CITATIONS

Cases:

Armco Steel Corp. v. *United Mine Workers*, 505 F. 2d 1129, petition for a writ of certiorari pending, No. 74-1574	10, 11
Boys Markets v. *Clerks Union*, 398 U.S. 235	10
Buffalo Forge Co. v. *United Mine Workers*, 517 F. 2d 1207, petition for a writ of certiorari pending, No. 75-339	11
Gateway Coal Co. v. *United Mine Workers of America*, 414 U.S. 368	7, 10
Hyster Co. v. *Independent Machine Association*, C.A. 7, No. 75-1066, decided July 7, 1975	11
Inland Steel Co. v. *Local 1545, United Mine Workers of America*, 505 F. 2d 293	8, 11

Cases—Continued	Page
Island Creek Coal Co. v. *United Mine Workers*, 507 F. 2d 650, petition for a writ of certiorari pending, No. 74-1573	10, 11
Monongahela Power Co. v. *Local 2332, I.B.E.W.*, 484 F. 2d 1209	11
Montana-Dakota Utilities Co. v. *National Labor Relations Board*, 455 F. 2d 1088	9
NAPA Pittsburgh, Inc. v. *Automotive Chauffeurs*, 502 F. 2d 321, certiorari denied, 419 U.S. 1049	11
National Labor Relations Board v. *Rockaway News Co.*, 345 U.S. 71	9
Statutes:	
National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*):	
Section 8(a)(1)	6
Section 8(a)(3)	6

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A9) is reported at 511 F. 2d 284. The Board's supplemental decision and order (Pet. App. A11-A33) is reported at 210 NLRB No. 87. Its initial decision and order (Pet. App. A34-A38) is reported at 200 NLRB 647.

JURISDICTION

The judgment of the court of appeals (Pet. App. A10) was entered on April 14, 1975. The petition for a writ of certiorari was filed on July 11, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board properly found that the union did not contractually waive the employees' statutory right to participate in a sympathy strike.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*), are set forth at Pet. 3-4.

STATEMENT

A. The Board's Findings of Fact

The Company, which supplies water to residential and industrial customers, had bargaining contracts with two locals of the International Union of Allied and Technical Workers of the United States.[1] One local represented its production and maintenance employees, and the other local represented its clerical employees (Pet. App. A13).

[1] Respondent United Steelworkers of America has succeeded the Allied and Technical Workers as the collective bargaining representative.

On June 1, 1971, the production unit struck the Company following expiration of its contract. Thirty-three of the 34 clerical employees honored the production unit's picket line (Pet. App. A14). In letters dated June 3 to the clerical local's officers and to its members, the Company stated that it considered the sympathy strike a violation of the clericals' contract,[2]

[2] Both units' agreements contained the following clause (Pet. App. A43):

ARTICLE V

Grievances

It is expressly understood and agreed that the services to be and being performed by the employees covered by this agreement pertain to and are essential to the operation of a public utility and to the welfare of the public dependent thereon, and in consideration thereof, and of the agreement and conditions herein by and between the Company and the Union be kept and performed, the Company and the Union mutually agree that during the term of this agreement there shall be no lockouts by the Company and there shall be no strike, stoppages of work or any other form of interference with any of the production or other operations of the Company by the Union or its members, and any and all disputes and controversies arising under or in connection with the terms of provisions hereof shall be subject to the grievance procedure hereinafter set forth if the grievance is filed within ninety (90) days of the occurrence.

The article provides for a three-step grievance-arbitration procedure, with binding arbitration as the third step. The clerical unit contract contains a provision not in the production unit contract, which provides in pertinent part (*ibid.*):

ARTICLE XVIII

Effectiveness

(2) The Union agrees there shall be no strikes, slowdowns or other interruption of work by any of its mem-

directed all clerical employees to return to work by June 7, and warned of possible discharges for failure to do so (*ibid.*).

On June 17, the Company sent each striking member of the clerical unit a letter stating that the addressee had been discharged for breach of the no-strike clause (Pet. App. A15). The strike continued; the discharged clericals joined the production workers' picket line (*ibid.*). On August 18 the members of both locals unconditionally offered to return to work. The production workers returned on August 30, but the Company refused to reinstate the clerical workers, contending that they had been discharged. The Company refused to bargain with or process the grievances of members of the clerical local (Pet. App. A16-A17).

During its negotiations with the striking production workers, the Company twice had attempted to obtain agreement to a no-strike clause that would bar sympathy strikes. On June 9 the Company submitted a memorandum of agreement for signature by the Union and both locals, which stated in part (Pet. App. A14-A15):

> From and after June 11, 1971, the Union recognizes that in view of the fact that the Employer is a public utility, the no-strike clause affords

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bers during the term of this agreement, and the Company agrees that there shall be no lockout during the term of this agreement, and both parties agree that any disputes or differences shall be taken up under the Grievance and Arbitration procedures of this agreement.

> no protection except the grievance procedure, to employees who fail or refuse to cross picket lines around the Company premises or operations, or operations of customers, whether legal or illegal, or fail or refuse to work for any other reason; and furthermore, the Union agrees that it will not intimidate or punish or fine any member who crosses or desires to cross a picket line around such company or premises when the bargaining unit to which the employee belongs is not subject to strike.

The Company's president explained that the Company "had been having trouble with one local honoring the other's picket line, that it had the problem now, and expected it again in the future." The Union rejected the proposal (Pet. App. A15). On July 20 the Company's attorney proposed the following provision (*ibid.*):

> As a part of the settlement of the contract negotiations between the Company and District 50, Allied and Technical Workers, and its members, it is agreed that the wording of Article V of the contract between the parties dated [6/18/68] (and of the same wording as incorporated in the new contract now being negotiated) prohibits any and all work stoppages, strikes, slow-downs, or observances of picket lines from and after June —, 1971. (The parties remain in disagreement as to the proper interpretation of that wording prior to that date).

The attorney cited the Company's need to solve the problem of one local's honoring the other's picket line, saying that "it had to be cleared up once

and for all." Again, the Union did not accept the proposal (*ibid.*).

B. The Board's Decision

The Board held that the no-strike provisions in the clerical workers' agreement did not waive their statutory right to observe the picket line of the production unit, and that the discharge of the clericals for such activity therefore violated Section 8(a)(1) and (3) of the Act (Pet. App. A11-A33). The Board said (Pet. App. A22):

> It is our opinion that the no-strike, no lockout promise was intended to be in effect only when the dispute between the parties is covered by and can be resolved by the grievance machinery. Here the no-strike, no-lockout provisions are not only included in the opening paragraph of the grievance provision but are part of the same sentence which sets up the grievance machinery and limits it to "all disputes and controversies arising under or in connection with the terms . . . hereof." Indeed, it is difficult to imagine a placement of the no-strike provision which would delineate more clearly or emphatically that the no-strike promise does not stand alone but is part of, and only as extensive as the scope of, the grievance machinery. Both times that the no-strike language appears the grievance language immediately follows. It is our opinion that the Union pledged no-strike only over matters which Respondent agreed to arbitrate. [Footnotes omitted.]

The Board added (Pet. App. A21-A22):

> The strike by the clerical unit was not over a grievance which the parties were contractually bound to arbitrate. Rather, the strike itself precipitated the dispute—the validity under the Union's no-strike obligation of the employee-members honoring the p & m unit's picket line. Put differently, the dispute was between the p & m unit and the [Company] and therefore not resolvable under the clerical unit's grievance procedure.

Chairman Miller and Member Kennedy dissented, arguing that the no-strike clause in the collective bargaining agreement should be construed to waive the right to engage in sympathy strikes (Pet. App. A30-A32). The dissenters did not contest the majority's legal analysis.

C. The Court of Appeals' Decision

The court of appeals upheld the Board's decision and enforced its order (Pet. App. A1-A9). The court held that *Gateway Coal Co.* v. *United Mine Workers of America*, 414 U.S. 368, supported the Board's position that any waiver of the right to strike broader than the scope of the arbitration clause must be explicit (Pet. App. A5).[3] It agreed with the Board that the contractual language here "indicates an intention to treat the no-strike clause as having application coextensively with that of the arbitration

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[3] *Gateway Coal* held that "[a]bsent an explicit expression of such [other] intention * * * the agreement to arbitrate and the duty not to strike should be construed as having coterminous application" (414 U.S. at 382).

clause"—which applies to " 'any and all disputes and controversies arising under or in connection with the terms of provisions' of the bargaining agreement" (Pet. App. A6). Because "[t]he refusal to dishonor another local union's picket line or engaging in a sympathy strike in connection with another local's strike are not disputes or controversies arising under or in connection with the first local union's agreement [they] are therefore neither arbitrable nor subject to the no-strike provisions" (*ibid.*).

The court distinguished its earlier decision in *Inland Steel Co.* v. *Local 1545, United Mine Workers of America*, 505 F.2d 293, which had held that the district court can enjoin a sympathy strike whenever the question as to the right to engage in that strike is encompassed by the arbitration clause of the collective agreement. The arbitration clause in *Inland Steel* covered not only differences "as to the meaning and application of the provisions of this agreement," but also differences "about matters not specifically mentioned in this agreement" and "local trouble of any kind [which may] arise at the mine" (Pet. App. A6); the court held that this clause was broad enough to waive the right to engage in a sympathy strike.

ARGUMENT

The basic issue in this case is whether the Board properly concluded that the no-strike arbitration provision of the collective agreement did not preclude the employees from engaging in a sympathy strike.

The Board's interpretation of the contract relies on settled principles of law, and its decision is one of fact, turning on the particular wording of the clause and its bargaining history. This case presents no question of law appropriate for review by this Court.

The decision here does not conflict with *National Labor Relations Board* v. *Rockaway News Co.*, 345 U.S. 71. As the Board pointed out (Pet. App. A23), the instant case is the reverse of *Rockaway*. The decision in *Rockaway* turned on the fact that during contract negotiations the union unsuccessfully attempted to alter the no-strike clause in order to permit employees to honor picket lines (345 U.S. at 79-80); here, by contrast, the employer attempted to obtain a provision expressly outlawing sympathy strikes, but was unsuccessful. In *Rockaway* there was persuasive evidence that the parties intended the no-strike commitment to extend to sympathy strikes; here the intention was the reverse.[4]

Indeed, *Rockaway* strongly supports the decision below, for it holds that, as a general matter, sympathy strikes are protected employee activity absent an express waiver of the right to engage in such strikes. The Board correctly held that the no-strike clause in this case should be construed as similar in scope to

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[4] *Montana-Dakota Utilities Co.* v. *National Labor Relations Board*, 455 F.2d 1088 (C.A. 8), on which petitioner also relies (Pet. 9), reveals a bargaining history similar to that in *Rockaway*. The court found that the contract prohibited a sympathy strike where the union had sought a clause barring discipline for engaging in such a strike, but succeeded in obtaining only a prohibition against discharge (*id.* at 1090).

the arbitration clause; because the arbitration clause here is limited to disputes arising under the agreement, and because the sympathy strike clearly was not such a dispute, the no-strike clause did not waive the employees' rights.[5]

Petitioner asserts that there is a conflict among the circuits concerning the questions presented here. But the cases cited by petitioner (Pet. 8-9) deal with the issue whether an *injunction* can be obtained against a sympathy strike. Questions concerning the availability of injunctions despite the Norris-LaGuardia Act are entirely distinct from the question whether the employer can resort to self-help (such as discharges) when its employees strike.[6]

In any event, the contract clauses involved in the cases in which injunctions have been issued were broader in scope than the clause here. The clause at

[5] Petitioner's assertion (Pet. 2-3, 8) that the Board and the court below held that a no-strike commitment cannot be broader than the undertaking to arbitrate is inaccurate. They held only that any waiver of the right to strike broader than the scope of the arbitration clause must be explicit. See *Gateway Coal, supra.*

[6] The cases cited by petitioner raise two questions, neither of which is involved here: first, whether the legality of a sympathy strike under the no-strike-arbitration clause is itself an arbitral question; second, if the strike's legality is an arbitral issue, whether *Boys Markets* v. *Clerks Union*, 398 U.S. 235, authorizes a court to enjoin the strike pending the arbitrator's decision. See *Island Creek Coal Co.* v. *United Mine Workers*, 507 F.2d 650 (C.A. 3), petition for a writ of certiorari pending, No. 74-1573, and *Armco Steel Corp.* v. *United Mine Workers*, 505 F.2d 1129 (C.A. 4), petition for a writ of certiorari pending, No. 74-1574, which raise the

issue in *Monongahela Power Co.* v. *Local 2332, I.B.E.W.*, 484 F.2d 1209 (C.A. 4), was similar to that in *Inland Steel, supra.*[7] In *NAPA Pittsburgh, Inc.* v. *Automotive Chauffeurs*, 502 F.2d 321 (C.A. 3) (*en banc*), certiorari denied, 419 U.S. 1049, the agreement specifically permitted refusal to cross a primary picket line, thereby clearly making it a breach of the agreement to fail to cross a secondary picket line (502 F.2d at 322-323). Cf. *Hyster Co.* v. *Independent Machine Association*, C.A. 7, No. 75-1066, decided July 7, 1975.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

JOHN C. MILLER,
Acting General Counsel,

JOHN S. IRVING,
Deputy General Counsel,

NORTON J. COME,
Deputy Associate General Counsel,

LINDA SHER,
Attorney,
National Labor Relations Board.

OCTOBER 1975.

second issue. See also *Buffalo Forge Co.* v. *United Steelworkers*, 517 F.2d 1207 (C.A. 2), petition for a writ of certiorari pending, No. 75-339.

[7] Similar clauses were involved in *Island Creek Coal* and *Armco Steel, supra*, n. 6.

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